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IN THE
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October Term, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW MEXICO

SUPPLEMENTAL BRIEF OF THE STATE
OF NEW MEXICO IN OPPOSITION

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In its Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico the United States asserted that:

(i)n the proceedings before the special master, the United States specified three purposes of the Gila National Forest for which water was necessary: (a) maintenance of an assured flow of 2 cubic feet per second at three separate points on the stream within the national forest to protect the forest from fire and erosion and to keep an endangered species of trout from depletion; (b) recreational uses incidental to hiking, fishing, camping, and hunting by visitors to the national forest; and (c) consumption by stock that graze on rangeland areas within the national forest under permits granted by the Forest. . .

In New Mexico's brief in opposition it was stated that "(i)n its statement of the case the United States has misrepresented

its presentation to the New Mexico courts of its reserved water right claims. . . ." (p.2). Elaborating on the statement, we said:

The evidentiary presentation is misrepresented in two ways. Most importantly no evidence was tendered relating to a need for an adjudicated right to minimum instream flows to enable the Forest Service to protect the forest from fire and erosion. In its inventory of claimed reserved water rights the Forest Service listed three minimum instream flows of 2 cfs each for "fish purposes." At trial it was stated that the claimed water uses were needed only to protect a rare and endangered species of trout indigenous to the Gila National Forest. (Transcript of Record, p. 535 and p. 566).

In reply, the Solicitor General has stated that New Mexico's statement "is incorrect," because:

(a)s the United States pointed out before the district court (Tr. of Record 373-375), the special master took judicial notice that live streams not only support fish life but serve other valid forest purposes, including erosion control, fire protection, watershed protection, and wildlife habitat protection. (Reply Memorandum for the United States, pp. 2-3).

Following this statement in a footnote, the Solicitor concluded that "(t)hus, there is no merit to respondent's contention that the special master recognized the United States' right to minimum instream flows for 'fish' purposes only." (Id., p. 3).

The reference to the Transcript of Record upon which the United States relies is to pages 374-376, which are pages 3-6 of one of the government's memorandum briefs entitled "Objections to Proposed Order Submitted by State Engineer Sustaining Objections and Modifying Findings of Fact and Conclusions of Law." In that brief the United States made the same statement that was made in the Reply Memorandum on petition to this Court, viz.:

The Special Master stated, at the final hearing held by him on the validity of the United States' claims for rights to instream uses to maintain minimum flows for valid forest purposes, that he could judicially notice that these live

streams not only supported fish life but served other valid forest purposes such as erosion control, fire protection, watershed protection, maintenance of natural flow downstream from the forest lands, wildlife habitat protection, aesthetics, etc.

A review of the actual evidentiary hearing and transcript of record, however, shows that the instream uses were claimed to be needed only to protect a species of trout indigenous to the Gila National Forest and that the Master did not recognize the claimed flows for any other purpose. (Transcript of Record, pp. 468-592, esp. p. 535 and p. 566). The Special Master *did not* judicially notice that erosion control, fire protection, or watershed protection required the recognition of rights to minimum instream flows. At a hearing subsequent to trial, counsel for the United States made the argumentative suggestion that the Master take such notice, but the Master did not, as his refusal to amend his findings and conclusions establishes. (Transcript of Record, Vol. 5, pp. 10-20). No evidence was presented respecting any other need for the claimed instream flows, and there is no question that the burden of going forward and the burden of proof in this regard were clearly on the United States.* (Kinney, Irrigation and Water Rights, §1554,

*Apparently recognizing its weak position with respect to minimum instream flows for "fish purposes," the United States attempted to articulate its claims on the basis of other alleged forest purposes subsequent to trial. In response New Mexico stated that:

... (The United States is) (n)ow, however, asking the court to ignore the record and the evidence at trial, to substitute new 'purposes' for the claimed instream uses, and to change its decision sustaining New Mexico's objections. I would suggest, however, that the proper forum in which to argue the merits of your honor's decision is the New Mexico Supreme Court on appeal.

It appears that the United States is simply quarreling with the court's decision. The United States is also suggesting that the court disregard certain uncontested evidentiary findings and replace them with "judicial notice" of other alleged facts which would operate to change the result of the trial. As to the former approach the proper forum is the New Mexico Supreme Court, and as to the latter it is not only "a bit unusual," as the United States suggests, but a bit irregular. (Tr. of Record, Vol. V, pp. 36-38).

p. 2802). It is also clear that neither the Court nor its Special Master could have taken judicial notice of ultimate facts. The question was not whether "wildlife habitat protection (and) aesthetics" would be enhanced by an abundance of water, but rather whether these objects were "valid forest purposes" within the meaning of the Organic Administration Act of June 4, 1897.

In petitioning this Court to issue a writ of certiorari to the New Mexico Supreme Court the United States is bound by its case as it is. With respect to its claims for future water rights, which have not yet been asserted in this case, the United States is not barred from asserting that instream flows might be necessary for erosion control or fire protection on the basis of the recognized purposes of prudent watershed management and the maintenance of timber. Indeed, on November 28th and 29th, 1977, the United States made just such assertions with regard to the Lincoln National Forest in another adjudication pending in state court in New Mexico. (*State ex rel. S. E. Reynolds v. L. T. Lewis, et al.*, Chaves County Cause Nos. 20294 and 22600; cf., Reason No. 3 for denying the writ, New Mexico's brief in opposition, pp. 17-18). With respect to the minimum instream flow claims already adjudicated, the only question that would properly be before this court if the writ were issued would be whether "fish purposes" were among the authorized purposes for which the Gila National Forest lands were or could have been withdrawn from the public domain. Colored by even the most romantic reading of the relevant legislative history, the answer to that question is undeniably no.

Respectfully submitted,

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